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MEMORANDUM

TO: Mr. David Nevala
Mr. Brian Scoggins
Arkansas Economic Development Commission

FROM: David Choate

DATE: February 3, 2009

RE: Norphlet Chemical, Inc. – Discussion in Response to Questions Posed by the Arkansas Economic Development Commission

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The purpose of this memo is to provide discussion and analysis in response to the list of questions provided to me by Mr. David Nevala of the Arkansas Economic Development Commission. The discussion and analysis are based on the facts as I understand them to be and based on the documents related to Norphlet Chemical, Inc. which have been provided to me for review. This memo is not intended to be an exhaustive review of all potential state, federal, and/or local environmental laws which could affect this situation. Rather it is a response to the specific questions posed, incorporating discussion of the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") as CERCLA may apply to the facts of this situation.

This memo is organized by question, with each numbered AEDC question appearing in bold below, followed by discussion and analysis. After reviewing this memo, if you have any questions or comments, please feel free to contact me anytime.

1. Review the Tulstar contract and determine if the product they sent to Norphlet Chemical that is still in a pure state is theirs. If it is not, as they stated to me, do they have any other environmental liability because they owned the raw materials that were sent to Norphlet Chemical. Norphlet Chemical was in a tolling arrangement with Tulstar.

Based on the language of the Agreement between Norphlet Chemical ("Norphlet") and Tulstar, it appears that Tulstar intended to retain, and likely did retain, ownership in the raw materials that it supplied to Norphlet. The Agreement does not specifically state that Tulstar owns and will continue to own the raw materials; however, the specific responsibilities and limitations placed on Norphlet with respect to the raw materials indicate Tulstar's ownership interest. First, the Agreement explicitly states that Tulstar will pay Norphlet a tolling fee "for production" of HFC-134a "that is tolled for Tulstar." (*See,* Sections 1A and 1B of the Agreement). In other words, Tulstar agrees to pay Norphlet not for materials but rather for the service of producing the HFC-134a, using the raw materials that Tulstar provides. Second, the Agreement requires Norphlet to indemnify Tulstar for "any loss" related to the raw materials after Norphlet takes possession. Third, the Agreement states that if Norphlet fails to produce HFC-134a in certain quantities and of a certain quality, Norphlet must pay Tulstar for all costs and expenses associated with the raw materials. Fourth, the Agreement requires Norphlet to pay Tulstar for the cost of any raw materials that are used to make HFC-134a that are not purchased by Tulstar. (*See,* Section 1B of the Agreement).

In summary, the Agreement essentially grants Norphlet possession of the raw materials free of charge on the condition that Norphlet returns the raw materials to Tulstar in the form of a manufactured and finished product. In the event that Norphlet fails to so return the raw materials, Norphlet must pay Tulstar for the cost of all raw materials not returned. Under no part of the Agreement is Norphlet granted any traditional rights of ownership in the raw materials. Norphlet did not have freedom to do with the raw materials as it wished; rather it was required to use them to manufacture a specific product to be provided to a specific entity. Failure to do so would result in Norphlet's having to pay Tulstar for the cost of the raw materials. Further, while Norphlet was given the right to sell finished product that Tulstar opted not to buy, it was only allowed to sell to two specified buyers, and the Agreement still required Norphlet to pay Tulstar for the cost of the raw materials.

These limitations and requirements of the Agreement indicate that Tulstar intended to retain and likely did retain ownership of the raw materials delivered to Norphlet. Meanwhile Eighth Circuit Court of Appeals decisions indicate that Tulstar would likely be considered a responsible party under environmental laws in the event of a release or threatened release of hazardous materials from the Norphlet facility.

Court holdings indicate that, in the event of a release or threatened release of hazardous substances from Norphlet, Tulstar would potentially be liable under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Under CERCLA, the four categories of persons who are legally responsible for the cleanup of hazardous substances at a given facility are: (1) those who own and operate the facility at the time a release or threatened release exists; (2) those who owned or operated the facility at any time when hazardous substances were disposed of at the facility; (3) those who arrange for disposal or treatment, or arranged for transport for disposal or treatment, of hazardous substances which they owned or possessed; and (4) those who transport hazardous substances to the facility. (*See*, 42 U.S.C.S. § 9607(a); and *United States v. TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. Iowa 1995)). Clearly under CERCLA those who are owners and/or operators of a facility would be potentially responsible

parties; however, those who arrange for disposal or treatment of hazardous substances are also potentially liable. Courts have indicated that this category of arranger liability can include those who supply raw materials to a facility for manufacturing/finishing under a tolling agreement.

In *United States v. Aceto Agric. Chems. Corp.*, the Court of Appeals for the Eighth Circuit considered a situation very similar to the current arrangement between Norphlet and Tulstar. (*See*, *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. Iowa 1989)). In *Aceto*, several companies contracted with a group called Aidex under which Aidex would formulate the companies' technical grade pesticides into a commercial grade product. As the formulator, Aidex would convert the companies' active ingredients to a commercial grade product which would then be shipped back to the companies or shipped directly to customers of the companies. (*See, Id.*). Aidex the formulator eventually went bankrupt, and a release of hazardous substances was discovered at the Aidex facility. The Environmental Protection Agency ("EPA") responded to the release and under CERCLA sought to recover its response costs from the companies who sent the materials to Aidex, claiming that the companies arranged for disposal of the hazardous substances. (*See, Id.*). The Court considered the facts and held that the companies could be liable as arrangers under CERCLA because: (1) there was no transfer of ownership of the hazardous substances (the companies retained ownership of the substances throughout the process); (2) the formulator was performing a process on products owned by the companies and at the companies discretion; and (3) hazardous waste is generated and disposed of contemporaneously with the formulation process. (*See, Id.*).

The factual similarities between the *Aceto* case and the current situation with Norphlet chemical are clear, and the Court's holding establishes a potential for Tulstar's liability as an arranger, should a release occur from Norphlet. Apparently Tulstar has asserted to Norphlet that Tulstar would not be liable in the case of a release. Most courts, however, have held that CERCLA imposes strict liability and joint and several liability among the potentially responsible parties. (*See*, *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. Iowa 1989)). Tulstar might argue that it is not liable because it had no control over the raw materials once they were in Norphlet's possession; however, control is not a necessary factor in every case of arranger liability under CERCLA. (*See*, *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. Ark. 2001)). Evidence of actual control is not necessary for arranger liability if ownership issues are otherwise established. (*See*, *United States v. Vertac Chem. Corp.*, 966 F. Supp. 1491 (E.D. Ark. 1997)). Further, liability does not require that Tulstar specifically intended to arrange for disposal of hazardous substances; the fact of arrangement is enough. (*See*, *United States v. Vertac Chem. Corp.*, 966 F. Supp. 1491 (E.D. Ark. 1997)).

Given the broad reach of CERCLA to impose liability on those who arranged for disposal of hazardous substances, along with the Court's holding and its analysis in the *Aceto* case, it is likely that Tulstar would be liable for response costs associated with any release or threatened release from Norphlet.